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SEPTEMBER 11 AND MEXICAN IMMIGRANTS: COLLATERAL DAMAGE COMES HOME

Kevin R. Johnson*

INTRODUCTION

The federal government responded swiftly to the mass destruction and horrible loss of life on September 11, 2001. Quickly initiating a war on terror, the U.S. government pursued military action in Afghanistan.¹ The violation of the civil rights of Arab and Muslim noncitizens in the United States followed as well.² In the months immediately after September 11, the federal government arrested, interrogated, and detained more than one thousand Arab and Muslim “material witnesses” without charging them with crimes.³ Congress swiftly passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act),⁴ which, among other things amended the immigration laws in important ways. Although Arab and Muslim noncitizens felt the brunt of the civil rights deprivations in the immediate

* Associate Dean for Academic Affairs, University of California at Davis, Professor of Law and Chicana/o Studies; Director, Chicana/o Studies Program (2000-01); A.B., University of California, Berkeley; J.D., Harvard University. Thanks to Craig Mousin, Gil Gott, and Sumi Cho for their roles in assisting the students organizing the symposium and for their hospitality to the symposium participants. Thanks also to the DePaul Law Review editors, especially Mary Ann Becker and Mark Bradford, for organizing a memorable immigration symposium of academics, activists, lawyers, and students.

1. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 237-55 (2002) (describing events of September 11, 2001 and the U.S. government's response).

2. See Viet D. Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL'Y 399, 401-06 (2002) (describing U.S. government's conduct in the war on terrorism); see also *The Aftermath of September 11: A Chronology*, 79 INTERPRETER RELEASES 1359 app. 1 (2002) (providing a chronology of legal responses of Bush administration to events of September 11, 2001). See generally WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN TIMES OF WAR* (1998) (analyzing history of restrictions of civil liberties in wartime).

3. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002).

4. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, §§ 412, 201-25, 115 Stat. 272, 278-96, 350-52 (2001) [hereinafter USA PATRIOT Act].

aftermath of September 11,⁵ immigrants in general will suffer the long-term consequences of the many measures taken by the federal government in the name of fighting terrorism.⁶

The U.S. government directed drastic measures at noncitizens, in part because the law affords great deference to the executive branch in immigration and national security matters.⁷ This Article analyzes important collateral damage of the "war on terrorism," specifically the impact of the government's response to September 11 on the Mexican immigrant community in the United States, as well as on prospective Mexican immigrants and temporary visitors. More than 200,000 immigrants from Mexico came to the United States in 2001 alone, the largest contingent of migrants from any nation and almost 20% of all immigrants to this country.⁸ In addition, the Immigration and Naturalization Service (INS) has estimated that, at least as of 1996, more than 2.7 million undocumented immigrants from Mexico, over half of the total undocumented population, live in the United States.⁹ In sum, Mexican citizens comprise the largest group of immigrants, legal and undocumented, in the United States.

As we will see, past immigration reforms in response to terrorism fears offer sobering lessons for immigrants. The history of ideological

5. See Akram & Johnson, *supra* note 3; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002); Thomas W. Joo, *Presumed Disloyal: Wen Ho Lee, Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

6. Indeed, the indefinite detention of Jose Padilla, a U.S. citizen who had converted to Islam, arrested in the United States, but labeled an "enemy combatant" and held without being charged with a crime, suggests that citizens as well as noncitizens should be concerned about the powers of the government in these times. See *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); David Johnston, *F.B.I. Talked of Following Bomb Suspect Before Arrest*, N.Y. TIMES, June 13, 2002, at A32; see also *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (addressing claims of another U.S. citizen held as an "enemy combatant").

7. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980); see also Cole, *supra* note 5 (documenting various actions taken against "enemy aliens" by the U.S. government in the wake of September 11). See generally Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons For Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997) (analyzing history of efforts to use immigration laws to regulate political ideology, particularly in times of national crisis); John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481 (1988) (considering the history of ideological exclusion in U.S. immigration laws).

8. See 2001 U.S. IMMIGR. AND NATURALIZATION SERVICE, ANN. REP.: LEGAL IMMIGR. 2 (Aug. 2002).

9. See U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGR. AND NATURALIZATION SERV. 240 tbl.1 (2000) [hereinafter INS 1998 STATISTICAL YEARBOOK].

regulation, including severe steps in the name of fighting the communist threat such as ideological exclusion and deportation, indefinite detention, and similar extreme measures, shows the extremes that U.S. immigration laws have gone to protect the nation's security.¹⁰ Recent events fit in well with the historical pattern. In 1996, Congress enacted immigration reform legislation, motivated in no small part by a desire to fight terrorism, which adversely impacted the immigrant community as a whole. The reforms resulted in record levels of deportations, including the removal of thousands of Mexican nationals.¹¹ Similarly, post-September 11 immigration restrictions, enforcement measures, and citizenship requirements will likely have a disparate impact on immigrants, particularly those from Mexico.¹² To this point, little attention has been paid to the general impacts on the immigrant community of the U.S. government's response to the tragedy of September 11, 2001. As with immigration measures generally, the new enforcement measures will predominately impact people of color.¹³

This Article focuses on concrete immigration law and policies affected by the events of September 11. The federal government's reaction, however, may well have stirred the nativist pot, thereby triggering a general antipathy for immigrants.¹⁴ The nasty efforts of one member of the U.S. Congress in the summer of 2002 to deport an undocumented honor student and his family to Mexico suggests the resurgence of a generalized anti-immigrant sentiment not limited to Arabs and Muslims.¹⁵ Nativism historically has proven difficult to limit to certain immigrant groups.¹⁶ For example, public concern with the use of public benefits by *undocumented* immigrants, exemplified

10. See *supra* note 7 and accompanying text.

11. See *infra* notes 38-42 and accompanying text.

12. See *infra* notes 43-130 and accompanying text.

13. See Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1505-08 (2002).

14. See Hing, *supra* note 5 (documenting violence and hate crimes directed at immigrants after September 11).

15. See Michael Riley, *Tancredo Presses to Deport Student*, DENVER POST, Sept. 1, 2002, at A1; 148 CONG. REC. H6544 (Sept. 24, 2002) (statement of Rep. Tancredo). The deportation efforts were triggered by a *Denver Post* story discussing the student's inability to afford college. See Riley, *supra*. Access of undocumented immigrants to higher education has been the subject of academic analysis. See, e.g., Victor C. Romero, *Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls*, 27 N.C. J. INT'L L. & COM. REG. 393 (2002); Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, 22 HASTINGS CONST. L.Q. 1019 (1995).

16. See T. Alexander Aleinikoff, *The Tightening Circle of Membership*, in IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 324 (Juan F. Perea ed., 1997).

by California's Proposition 187,¹⁷ culminated in the denial of most benefits to *legal* immigrants in the 1996 welfare reform.¹⁸ In a similar vein, the attacks on immigrants may effectively amount to thinly veiled attacks on racial minorities, with U.S. citizens sharing the ancestry of certain immigrant groups stereotyped as "foreigners."¹⁹ Consequently, the legal damage to the immigrant community outlined in this Article is only part of the entire picture.

Part II of this Article considers the possible immigration reforms that may come on the heels of September 11 and identifies how they might well have broad negative impacts on the immigrant community, including on many immigrants having nothing remotely to do with terrorism.²⁰ Part III analyzes how September 11 put the brakes on reform efforts that would have benefited immigrants immensely and has encouraged law enforcement conduct that will likely have adverse effects on immigrant and minority communities.²¹ Ultimately, persons of Mexican ancestry—citizens and noncitizens—will be disparately affected by the legal changes triggered by September 11.

II. PAST IMMIGRATION REFORM AS PRELUDE? CHANGING IMMIGRATION AND IMMIGRANT LAW AFTER SEPTEMBER 11

The leeway afforded the federal government in immigration matters allows the political branches to swiftly take aggressive actions, thereby appearing to respond to complex problems. Such actions historically have injured immigrant communities. A concrete example is the effort to seal the U.S./Mexico border as part of the "war on drugs" and halting undocumented immigration, which has had a limited impact in achieving those goals.²² However, heightened border enforcement

17. See Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 277-78 (1996-97).

18. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). Congress later restored immigrant eligibility for certain benefits. See Noncitizen Benefit Clarification and Other Technical Amendments of 1998, Pub. L. No. 105-306, 112 Stat. 2926 (1998).

19. See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 117-29 (1997).

20. See *infra* notes 22-102 and accompanying text.

21. See *infra* notes 103-130 and accompanying text.

22. See generally PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE* (2000) (analyzing lack of effectiveness of border enforcement except for its political benefits).

has resulted in increased race-based law enforcement²³ and hundreds of deaths of Mexican citizens along the border.²⁴

In the wake of the 1995 Oklahoma City bombing, Congress passed two pieces of tough immigration legislation.²⁵ As Professor Peter Schuck succinctly observed, the 1996 immigration reforms constituted "the most radical reform of immigration law in decades—or perhaps ever."²⁶ Congress tightened the U.S. immigration laws despite the fact that a natural born U.S. citizen masterminded the Oklahoma City bombing, and there was absolutely no evidence of any involvement of foreign citizens.²⁷ This recent history sheds valuable light on the downside potential of immigrant reforms in response to fears of terrorism spawned by the events of September 11.

A. *Antiterrorism and Immigration Reform in 1996: Lessons About Reform in the Name of Terrorism*

In the end, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) arguably did little to quell the threat of terrorism in the United States.²⁸ However, AEDPA and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), passed just months later, denied judicial review of many deportation and related orders of the immigration bureaucracy.²⁹ Not until 2001 did the Supreme Court resolve a conflict among the circuits and ensure that habeas corpus review of removal orders remained intact, a result that the executive branch strongly opposed at every step.³⁰ Terrorism fears also fueled passage of a new summary exclusion procedure in 1996 by which a noncitizen could be barred admission into the country at the port of

23. See Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897 (2002).

24. See *infra* notes 51-52 and accompanying text.

25. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) [hereinafter AEDPA]; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [hereinafter IIRIRA].

26. PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS* 143 (1998).

27. See *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998). For no good reason, the initial stages of the Oklahoma City bombing investigation focused on Muslim and Arab terrorists. See Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2853-60 (2001).

28. See Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2075-76, 2080 (1996); Whidden, *supra* note 27, at 2853-60.

29. See AEDPA, *supra* note 25, § 440; IIRIRA, *supra* note 25, §§ 306(a), (d), 308(g)(10)(H), 371(b)(6); see, e.g., Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693, 705-07 (1998); Lisa C. Solbakken, Note, *The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext*, 63 BROOK. L. REV. 1381, 1389-91 (1997).

30. See *INS v. St. Cyr*, 533 U.S. 289 (2001).

entry by an INS officer without judicial review.³¹ In signing AEDPA into law, President Bill Clinton candidly admitted the collateral damage of the new law, which “*makes a number of major, ill-advised changes in our immigration laws having nothing to do with fighting terrorism.*”³²

Besides limiting judicial review of a variety of immigration decisions, the 1996 reforms vastly expanded the definition of “aggravated felony,”³³ which subjects an immigrant to deportation (without judicial review) and mandatory detention.³⁴ As Professor Nancy Morawetz aptly summarized, the expanded definition of “aggravated felony” has an

Alice-in Wonderland-like [quality] As the term is defined, a crime need not be either aggravated or a felony. For example, a conviction for simple battery or for shoplifting with a one-year suspended sentence—either of which would be a misdemeanor . . . violation in most states—can be deemed an aggravated felony.³⁵

31. See Immigration & Nationality Act (INA) § 235, 8 U.S.C. § 1225 (2000) (amended by various sections of AEDPA and IIRIRA); T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 863-71, 1028-29 (4th ed. 1998) (discussing summary exclusion provisions of 1996 immigration reforms). The much-publicized case of Sheik Omar Rahman, later convicted for his involvement in the 1993 World Trade Center bombing attempt, helped build public support for summary exclusion. See *United States v. Rahman*, 189 F.3d 88, 103 (2d Cir. 1999). An episode of the popular television show “60 Minutes” focused on Sheik Rahman’s case as an example of alleged asylum abuse and triggered Congressional interest in expedited removal. See *60 Minutes: How Did He Get Here?* (CBS television broadcast, Mar. 14, 1993); PHILIP G. SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA 42-44, 134, 137, 148, 162, 164, 217 (2000). For a comprehensive study of the expedited removal program, see *The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Review*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1 (2001). See also Dulce Foster, Note, *Judge, Jury and Executioner: INS Summary-Exclusion Power Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 82 MINN. L. REV. 209 (1997); Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213 (1999). But see David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT’L L. 673 (2000) (praising certain aspects of expedited removal provisions of 1996 immigration reform).

32. President’s Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, in 32 WKLY. COMP. PRES. DOC. 719, 721 (Apr. 24, 1996) (emphasis added).

33. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2000).

34. See INA § 236(c), 8 U.S.C. § 1226(c) (2000); INA 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) (2000). Indeed, the Immigration & Naturalization Service (INS) took the extreme position that it could indefinitely detain criminal aliens subject to deportation who could not be deported because their native countries would not accept them; the Supreme Court held that Congress had not authorized such an extreme step, which would raise serious constitutional concerns. See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

35. Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000) (footnotes omitted); see Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions*, 74 N.Y.U. L. REV. 1696 (1999); Dawn Marie Johnson, *The AEDPA*

To exacerbate matters for noncitizens, until the Supreme Court corrected the practice in 2001,³⁶ the INS retroactively applied the new deportation grounds in the 1996 reforms to criminal convictions before passage of the law.³⁷

With the prodding of Congress, the INS made deportation of criminal aliens its highest priority.³⁸ The 1996 immigration reforms resulted in record levels of deportations of "criminal aliens," with by far the largest number to Mexico. In fiscal year 1999, for example, the INS removed more than 48,000 (of a total of 62,359, or over 77%) Mexican nationals on criminal grounds.³⁹ In fiscal year 1998, the INS removed over 170,000 noncitizens from the United States, with over 139,000 (over 80%) from Mexico on all grounds.⁴⁰ Removals increased from 42,469 in fiscal year 1993 (with over 27,000, about 64 percent, from Mexico)⁴¹ to over 170,000 in fiscal year 1998, with over 147,000 (about 83%) from Mexico.⁴²

In sum, although AEDPA ostensibly was focused on terrorism, it and IIRIRA went well beyond that concern. Immigrants, especially those from Mexico, suffered.

B. The USA PATRIOT Act, Visa Monitoring, and Other Immigration Reforms

As suggested by the aftermath of the Oklahoma City bombing, a congressional response to September 11 likely will include immigration reforms. Congress has already taken some initial steps in this direction; more are on the horizon.

and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes, 27 J. LEGIS. 477 (2001).

36. See *INS v. St. Cyr* 533 U.S. 289 (2001).

37. See Daniel Kanstroom, *St. Cyr. or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413, 418-23 (2002); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998); see also Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453 (2001) (analyzing the Supreme Court's retroactivity analysis, including in the case of 1996 immigration reforms).

38. See Morawetz, *supra* note 35, at 1948-50 (summarizing the INS's "take-no-prisoners approach" to "the deportation of criminal aliens"); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 450-54 (1999) (discussing "recent progress" of INS in deporting criminal aliens); see also Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 42-45 (1997) (analyzing impact of popular image of immigrant as a criminal or terrorist).

39. See Press Release, U.S. Immigration & Naturalization Service, *INS Sets New Removals Record: Fiscal Year 1999 Removals Reach 176,990* (Nov. 12, 1999) (on file with author).

40. See *INS 1998 STATISTICAL YEARBOOK*, *supra* note 9, at 215, 217 tbl.65.

41. See *id.* at 218, 220, 222, 224 tbl.66.

42. See *supra* note 40 (citing authority).

The USA PATRIOT Act expands the definition of "terrorist activity" for purposes of the immigration laws in ways that may result in an additional removal ground for noncitizens convicted of assault and similar crimes.⁴³ "Terrorist activity" thus has gone the way of "aggravated felony" for immigration purposes, expanded well beyond what one normally would consider to be truly "terrorist" in nature.⁴⁴ The USA PATRIOT Act further provides that a spouse or child of a "terrorist" generally is inadmissible.⁴⁵ A noncitizen also may be deemed inadmissible for being "associated with a terrorist organization," broad terms reminiscent of the principle of guilt by association, a discredited law enforcement technique popular during the dark days of the McCarthy era.⁴⁶ Fears also have been expressed that the expanded definition of "terrorist activity" in the USA PATRIOT Act will adversely affect bona fide asylum-seekers fleeing persecution in their native lands.⁴⁷

Although there is no evidence that the terrorists involved in the September 11 hijackings evaded border inspection, the USA PATRIOT Act appropriated funds for increased enforcement of the U.S./Canada border.⁴⁸ The new funding responded to fears that terrorists might seek to enter the United States from Canada; on the eve

43. See USA PATRIOT Act, *supra* note 4, § 411 (expanding definition of "terrorist activity" to include using any "explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property"). The Justice Department reportedly was considering a second USA PATRIOT Act, expanding the Federal government's powers in the "war on terrorism." See *An Overzealous Patriot*, L.A. TIMES, Feb. 14, 2003, at pt. 2, p. 11.

44. See *supra* notes 33-37 and accompanying text.

45. See USA PATRIOT Act, *supra* note 4, § 411.

46. *Id.*; see Cole, *supra* note 5, at 966-69 (analyzing various provisions of USA PATRIOT Act organized around the principle of "guilt by association"). Even before passage of the USA PATRIOT Act, critics claimed that the definition of "terrorist activity," as amended by AEDPA, amounted to guilt by association. See Joseph Furst, Note, *Guilt By Association and the AEDPA's Fund Raising Ban*, 16 N.Y.L. SCH. J. HUM. RTS. 475 (1999); Andy Pearson, Note, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Return to Guilt By Association*, 24 WM. MITCHELL L. REV. 1185 (1998); see also Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1131 (1994) (noting broad definition of "terrorist activity" in immigration law before 1996); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 322-27 (2000) (same); Susan Dente Ross, *In the Shadow of Terror: The Illusive First Amendment Rights of Aliens*, 6 COMM. L. & POL'Y 75 (2001) (same); Nadine Strossen, *Criticisms of Federal Counterterrorism Laws*, 20 HARV. J.L. & PUB. POL'Y 531 (1997); Whidden, *supra* note 27, at 2871-74 (same).

47. See Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505 (2002).

48. See USA PATRIOT Act, *supra* note 4, § 402 (authorizing appropriations necessary to triple the Border Patrol personnel along northern border). The September 11 airplane hijackers entered the country on visas. See *infra* notes 53-54 and accompanying text.

of the new millennium, the federal government arrested an Algerian man with bomb-making materials seeking to enter at the Canadian border who was plotting to bomb Los Angeles International Airport.⁴⁹ Because the INS often utilizes race in border enforcement, one can expect an expansion of race-based immigration enforcement.⁵⁰ One potential benefit, however, is that the USA PATRIOT Act may help shift the myopic focus from the southern border with Mexico, which saw a dramatic escalation in border enforcement in the 1990s⁵¹ resulting in hundreds, perhaps thousands, of deaths of undocumented Mexican citizens seeking to cross the border in desolate, inclement locations.⁵²

In sum, the USA PATRIOT Act expanded the definition of "terrorist activity" in ways that will offer the INS expanded powers to deport noncitizens having only the most attenuated connection to "terrorist activity." Border enforcement also will be bolstered. In light of the current national mood, the federal government can be expected to aggressively exercise such powers against noncitizens.

1. *Visa Processing and Monitoring*

Most of the September 11 airplane hijackers apparently entered the country on student visas, which understandably provoked concern.⁵³ Concern erupted into a national furor when the INS sent visa renewals to two suspected hijackers many months after their deaths.⁵⁴ Efforts by the INS to improve the monitoring of temporary visitors on student and other visas became a high priority.

Immediately after September 11, the State Department began to slow the processing of visa applications, especially in nations believed to harbor terrorists.⁵⁵ In December 2001, the INS announced the ar-

49. See Jane Fritsch, *Algerian Sentenced in 1999 Plot to Bomb Airport*, N.Y. TIMES, Jan. 17, 2002, at A26; Sam Howe Verhovek & Tim Weiner, *Man Seized with Bomb Parts at Border Spurs U.S. Inquiry*, N.Y. TIMES, Dec. 18, 1999, at A1.

50. See Johnson, *supra* note 23, at 904-06.

51. See TIMOTHY J. DUNN, *THE MILITARIZATION OF THE U.S.-MEXICAN BORDER, 1978-1992: LOW INTENSITY CONFLICT DOCTRINE COMES HOME* (1996); JOSEPH NEVINS, *OPERATION GATEKEEPER* (2002); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS, J. INT'L L. & POL'Y 121 (2001).

52. See Hing, *supra* note 51, at 135-44.

53. See James H. Johnson, Jr., *U.S. Immigration Reform, Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C. J. INT'L L. & COM. REG. 421, 438-49 (2002) (reviewing immigration status of nineteen noncitizens involved in September 11 hijackings).

54. See Sensenbrenner *Leading the Charge for Immediate INS Overhaul*, CQ WKLY., Mar. 16, 2002, at 705.

55. See Jason Dearen, *For Immigration Lawyers, A Practice Completely Changed*, RECORDER (San Francisco), Sept. 11, 2002, at 6; Neil A. Lewis & Christopher Marquis, *Longer Visa Waits*

rests of noncitizens who had violated the terms of their student visas from nations with alleged terrorist links.⁵⁶ Shortly after, the Justice Department announced that its "Operation Absconder" would focus deportation efforts on six thousand young Arab and Muslim men from the same nations.⁵⁷

The federal government followed nation-specific monitoring of student visas with across-the-board efforts. In May 2002, Congress passed the Enhanced Border Security and Visa Reform Act⁵⁸ to improve the monitoring of noncitizens in the United States on student and other visas. Attorney General John Ashcroft later proposed a new National Security Entry-Exit Registration System that imposed special registration requirements on noncitizens who, as determined by the federal government, posed "national security risks."⁵⁹ Despite concerns that the proposed regulation would allow discrimination on the basis of race and religion, the final regulation was almost identical to the proposal.⁶⁰

In fiscal year 1998, Mexico was the third leading nation of origin of nonimmigrants (generally speaking, temporary visitors), sending over 65,000 nonimmigrants to the United States.⁶¹ As a consequence, even if tightened visa monitoring is not aimed directly at Mexican noncitizens, it will negatively impact them. Mexican students already have faced difficulties in entering the United States.⁶² More generally, tighter enforcement at the border has slowed trade and migration within North America, with economic and related consequences for Canada, the United States, and especially for Mexico.⁶³

for Arabs, N.Y. TIMES, Nov. 10, 2001, at A1; Mary Beth Sheridan, *Immigration Rules Tightened*, WASH. POST, Nov. 1, 2001, at A3.

56. See James Sterngold & Diana Jean Schemo, *10 Arrested in Visa Cases in San Diego*, N.Y. TIMES, Dec. 13, 2001, at B1.

57. See DOJ Focusing on Removal of 6,000 Men from Al Qaeda Haven Countries, 79 INTERPRETER RELEASES 115, 115 (2002); Deputy Attorney General Releases Internal Guidance for "Absconder" Apprehensions, 79 INTERPRETER RELEASES 261 (2002).

58. Pub. L. No. 107-173, 116 Stat. 543 (2002).

59. See 67 Fed. Reg. 40,581 (June 13, 2002); Groups Voice Concerns Over Plan to Fingerprint, Track U.S. Visitors, 70 U.S.L.W. 2793 (June 18, 2002).

60. See 67 Fed. Reg. 52,584, 52,585 (Aug. 12, 2002). Registration later focused on Muslims and Arabs and resulted in hundreds of detentions. See *Rights Groups Sue Due to Arrests of NSEERS Registrants, Lawmakers Respond to NSEERS Implementation*, 80 INTERPRETER RELEASES 41 (2003); Megan Garvey et al., *Hundreds are Detained After Visits to INS*, L.A. TIMES, Dec. 19, 2002, at pt. 1, p. 1.

61. See INS 1998 STATISTICAL YEARBOOK, *supra* note 9, at 123 chart G.

62. See Alison Gregor, *Stymied Studies; Visa Denials Hurt Border Institute, Strand Mexican Students*, SAN ANTONIO EXPRESS-NEWS, Dec. 21, 2001, at 1B; Marisa Taylor, *INS Tightens Up Visa Loophole*, SAN DIEGO UNION-TRIB., Oct. 31, 2002, at A1.

63. See Ginger Thompson, *After 9/11, Fox Still Waits For U.S. Moves on Mexico*, N.Y. TIMES, Sept. 13, 2002, at A1.

In essence, increased visa monitoring, and more general concerns with the verification of the identity of noncitizens, have had ripple effects that have negatively affected the immigrant community. For example, the California governor vetoed a law that would have made certain groups of undocumented immigrants in California eligible for driver's licenses—and would have given them access to a certain degree of security in U.S. society—because of concerns about identity fraud by terrorists after September 11.⁶⁴ Efforts of the Social Security Administration to verify the social security numbers of employees have resulted in many undocumented immigrants losing their jobs.⁶⁵

As with immigration reform generally, increased monitoring of non-immigrants will adversely affect noncitizens from many countries. Mexican citizens will be disproportionately affected by increased efforts at visa monitoring.

2. Increased Immigration Enforcement

As part of efforts at fighting terrorism, the U.S. government likely will pursue immigration enforcement policies that will adversely affect immigrants generally, not simply Arab or Muslim noncitizens. The Justice Department already has announced its intention to enforce the requirement that noncitizens report changes of address within ten days of moving or be subject to deportation.⁶⁶ Enforcement of this reporting requirement likely will result in many more possible removal cases based on a technical, relatively minor violations of the law. Given Attorney General Ashcroft's stated willingness to use the immigration laws, or, for that matter, any law, necessary to remove suspected "terrorists" from the country,⁶⁷ it is troubling to see any expansion of the grounds for removal.

The most dramatic change in immigration enforcement may be the incorporation of the INS into the new Department on Homeland Security, the proposal of which stemmed directly from the events of Sep-

64. See Nancy Vogel & Dan Morain, *No Licenses for Illegal Immigrants*, L.A. TIMES, Oct. 1, 2002, at pt. 2, p. 1.

65. See Michael Riley, *Bertha Larios: Social Security Net Snares Illegal Workers*, DENVER POST, Sept. 8, 2002, at A24; Dawn House, *Social Security Checks Called "Silent Raid" on Illegals*, SALT LAKE TRIB., July 14, 2002, at A1.

66. See 67 Fed. Reg. 48,818 (July 26, 2002); Jonathan Peterson, *Noncitizens Must Report If They Move*, L.A. TIMES, July 23, 2002, at pt. 1, p. 1.

67. See Philip Shenon & Don Van Natta Jr., *U.S. Says 3 Detainees May Be Tied to Hijackings*, N.Y. TIMES, Nov. 1, 2002, at A1 (reporting that Attorney General "Ashcroft offered a detailed explanation of the government's 'spitting on the sidewalk' policy, in which immigrants suspected of terrorist ties are apprehended for even minor, unrelated charges, just so long as they are taken off the street").

tember 11.⁶⁸ The INS long has over-emphasized enforcement to the neglect of its service mission, which includes adjudication of visa and naturalization petitions.⁶⁹ The reorganization may well result in an even greater over-emphasis on immigration enforcement in the name of "homeland security." Consequently, the reorganization likely will exacerbate the enforcement priority of the INS and adversely affect noncitizens.⁷⁰

C. Citizenship Requirements

The Supreme Court has permitted state governments to impose citizenship requirements on state jobs that perform a "political function."⁷¹ By executive order, the federal government has barred noncitizens from federal civil service jobs.⁷² As a result of the tragedy of September 11, the nation may well see a new round of citizenship requirements for a variety of jobs to ensure loyalty to the United States. The Aviation and Transportation Security Act,⁷³ which placed airport security in the hands of the federal government, made U.S. citizenship a qualification for airport security personnel. The citizenship requirement injures many lawful immigrants who had held these low-wage jobs in airports across the country.

68. See Homeland Security Act of 2002, Pub. L. No. 107-246, 116 Stat. 2135; Renae Merle, *Homeland Security Challenge: Make 22 Agencies Work as One*, WASH. POST, Jan. 6, 2003, at E1; *House Committees Mark Up Homeland Security Bill; Past Hearings Summarized*, 79 INTERPRETER RELEASES 1029 (2002).

69. See Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279, 340-41.

70. See *Hearing on H.R. 4660 and H.R. 3231 Before the House Comm. on the Judiciary*, 107th Cong. (2002) (statement of Kathleen Campbell Walker, House Judiciary Comm., FEDERAL DOC. CLEARING HOUSE CONGRESSIONAL TESTIMONY, June 27, 2002).

71. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.12, at 797-801 (6th ed. 1995); see, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (upholding a state law requiring "peace officers" to be U.S. citizens); *Ambach v. Norwick*, 441 U.S. 68 (1979) (public school teacher); *Foley v. Connelie*, 435 U.S. 291 (1978) (police officers). Cf. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1445-56 (1993) (discussing and rebutting objections to noncitizen suffrage in local elections on loyalty and other grounds).

72. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1690 n.335 (1992) (explaining history culminating in Executive Order). Constitutional challenges to this order have failed. See *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980), *cert. denied sub nom.*; *Lum v. Campbell*, 450 U.S. 959 (1981); *Jalil v. Campbell*, 590 F.2d 1120 (D.C. Cir. 1978) (*per curiam*); *Vergara v. Hampton*, 581 F.2d 1281 (7th Cir. 1978), *cert. denied sub nom.*; *Vergara v. Chairman, Merit Sys. Prot. Bd.*, 441 U.S. 905 (1979).

73. Pub. L. No. 107-71, § 111(a)(2), 115 Stat. 597, 617 (2001). The American Civil Liberties Union of Southern California has challenged the federal citizenship requirement as unconstitutional. See *Gebin v. Mineta*, 231 F. Supp. 2d 971 (C.D. Cal. 2002) (denying motion to dismiss); Nancy Cleeland, *Screener Rule Challenged*, L.A. TIMES, Jan. 18, 2002, at pt. 3, p. 2.

It was reported that over eighty percent of the security screeners at San Francisco International Airport and about forty percent of those at Los Angeles International Airport were lawful immigrants.⁷⁴ Although immigrants can be conscripted into the military and stationed at airports,⁷⁵ they no longer can work in airport security positions.

Immigration checks of airport employees have led to the arrests of undocumented persons. Few were of Arab or Muslim ancestry, and many almost invariably were from Asia and Latin America.⁷⁶ Moreover, the INS enforcement focus on airports has generated fear and heightened insecurity in immigrant communities.

Discrimination based on alienage can have disparate impacts on particular national origin groups. For example, in *Cabell v. Chavez-Salido*,⁷⁷ the Supreme Court in 1982 rejected an equal protection challenge to a California law interpreted to require that probation officers be citizens. For that reason, Los Angeles County did not hire Jose Chavez-Salido, a lawful permanent resident for twenty-six years who had been born in Mexico and had received all of his formal education, including a Bachelor of Arts degree, in the United States.⁷⁸ After reviewing the history of the California law, Justice Harry A. Blackmun wrote in dissent that, "I can only conclude that California's exclusion of these appellees from the position of deputy probation officer stems solely from state parochialism and *hostility toward foreigners* who have come to this country lawfully."⁷⁹

74. See Steven Greenhouse, *Groups Seek to Lift Ban on Foreign Screeners*, N.Y. TIMES, Dec. 12, 2001, at B10.

75. See 50 U.S.C. app. § 453 (1994); see also Charles E. Roh, Jr. & Frank K. Upham, *The Status of Aliens Under United States Draft Laws*, 13 HARV. INT'L L.J. 501 (1972).

76. See Rosanna Ruiz, *Airport Sweep Nets 143 Arrests*, HOUSTON CHRON., Sept. 10, 2002, at A1; Ted Bridis, *D.C.-Area Airport Raids Net Nearly 100 Arrests*, CHI. TRIB., Apr. 24, 2002, at 12; Juliet V. Casey, *Operation Tarmac: Advocates: Hispanics Unfairly Targeted*, LAS VEGAS REV.-J., Feb. 9, 2002, at 1B; Patrick J. McDonnell, *200 Airport Workers in West Arrested by INS*, L.A. TIMES, Mar. 27, 2002, at pt. 2, p. 7; Steve Miletich, *20 Arrested at Sea-Tac to Be Handled Through Deportation Actions*, SEATTLE TIMES, Jan. 23, 2002, at B1; Matthew B. Stannard, *INS Holds 25 at Airports*, S.F. CHRON., Mar. 26, 2002, at A1; *INS Arrests 30 Airport Employees in Portland*, SEATTLE TIMES, Dec. 21, 2001, at B2. For example, a pregnant, undocumented Mexican woman working as a cashier at a Domino's Pizza at Denver International Airport was arrested and detained by the federal government, forced to give birth while in custody, separated from her new-born baby, and deported to Mexico. See Tina Griego, *In the Name of National Security: DIA Anti-Terror Raid, Mom's Deportation Shatter Family*, ROCKY MTN. NEWS, Dec. 7, 2002, at 1A. Similarly, security checks of employees slated to work in connection with the January 2003 Super Bowl in San Diego, resulted in the arrest and detention of many Mexican immigrants without proper documentation. See *Cab Drivers and Guards Detained in a Three-Month Immigration Sweep*, N.Y. TIMES, Jan. 25, 2003, at D4.

77. 454 U.S. 432 (1982).

78. *Id.* at 448 n.1 (Blackmun, J., dissenting).

79. *Id.* at 463 (Blackmun, J., dissenting) (emphasis added).

Justice Blackmun's hint has gone largely unexplored. The scholarship analyzing the alienage discrimination decisions of the Supreme Court focuses on the constitutionality of the states' imposition of citizenship requirements, without considering their racial impacts.⁸⁰ A few commentators, however, suggest the need for strict scrutiny of alienage classifications in part because they can mask racial animus.⁸¹ This argument finds historical support. At various times in U.S. history, alienage discrimination, with state "alien land" laws targeting Japanese Americans, a notorious example, has served as a device to discriminate on the basis of race.⁸²

The federal government's movement toward citizenship requirements can be expected to encourage state and local governments, as well as private employers to do the same. Even before September 11, immigrants often found it difficult to avoid discrimination by employers in the workplace. The most potent bar to employment discrimination—Title VII of the Civil Rights Act of 1964—does not prohibit discrimination based on immigration status.⁸³ Although the immigration laws prohibit discrimination against noncitizens eligible to work, evidence suggests that discrimination by employers against persons of Latina/o and Asian ancestry continues to be a problem.⁸⁴ New citi-

80. See, e.g., Bosniak, *supra* note 46, at 1086-1137; Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591 (1994); Earl M. Maltz, *A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135 (1996).

81. See Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications after Adarand Constructors, Inc. v. Peña*, 76 OR. L. REV. 425 (1997); Tamra M. Boyd, Note, *Keeping the Constitution's Promise: An Argument for Greater Judicial Scrutiny for Federal Alienage Classifications*, 54 STAN. L. REV. 319, 338-41 (2001); *Developments in the Law - Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1408 nn.57-58 (1983); see also Johnson, *supra* note 13, at 1505-08 (stating that discrimination based on immigration status may mask racial discrimination because of the overlap between immigration status and race). Cf. Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000) (analyzing how English language proficiency can serve as a proxy for race in controversy over bilingual education).

82. See, e.g., *Oyama v. California*, 332 U.S. 633 (1948); *Cockrill v. California*, 268 U.S. 258 (1925); *Terrace v. Thompson*, 263 U.S. 197 (1923); see also *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948) (addressing commercial fishing license regulation directed at Japanese immigrants); Keith Aoki, *No Right to Own?: The Early Twentieth Century "Alien Land Laws" As a Prelude to Internment*, 40 B.C. L. REV. 37 (1998); 19 B.C. THIRD WORLD L.J. 37 (1998) (contending that alien land laws directed at Japanese immigrants in early twentieth century paved the way for internment of persons of Japanese ancestry during World War II).

83. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973); see also Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511 (2003) (contending that Congress should amend Title VII of the Civil Rights Act of 1964 to bar discrimination against immigrants authorized for employment under the law).

84. See U.S. GEN. ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION 8 (1990).

zenship requirements will likely increase discrimination against Latina/os and Asian Americans, who are stereotyped as "foreign" even if they are U.S. citizens.⁸⁵

Large numbers of lawful permanent residents from Mexico reside in the United States.⁸⁶ Although Mexican naturalization rates have increased in recent years,⁸⁷ many legal immigrants from Mexico live in the country and will be affected by the imposition of citizenship requirements.

D. Increased Local Involvement in Immigration Enforcement as a Threat to Civil Rights

The "war on terrorism" has caused the federal government to reconsider its exclusive domain over immigration enforcement and show a new willingness to delegate power to state and local law enforcement agencies to enforce the immigration laws.⁸⁸ In the summer of 2002, for example, the Justice Department entered an agreement with Florida to train a group of police officers to assist in the enforcement of the immigration laws.⁸⁹ This devolution-to-the-states movement ultimately could change the entire balance of immigration law enforcement power, which until relatively recently was almost exclusively in the hands of the federal government.⁹⁰

State and local involvement in immigration enforcement warrants concern because of the many civil rights violations of immigrants by local authorities, even though not officially in the business of immigra-

85. See Kevin R. Johnson, *Racial Hierarchy, Asian Americans and Latinos as "Foreigners," and Social Change: Is Law the Way to Go?*, 76 OR. L. REV. 347, 352-58 (1997); see also Victor C. Romero, *Proxies Paying? for Loyalty in Constitutional Immigration Law: Citizenship and Race after September 11*, 52 DEPAUL L. REV. 871 (2003) (analyzing critically citizenship requirements and racial profiling after September 11).

86. See *supra* note 8 and accompanying text.

87. See INS 1998 STATISTICAL YEARBOOK, *supra* note 9, at 180 tbl.48 (showing that Mexican immigrants who naturalized had increased from 18,520 in fiscal year 1989 to over 217,000 in fiscal year 1996).

88. See DOJ Legal Opinion Would Broaden Use of State, Local Personnel in Immigration Enforcement, 79 INTERPRETER RELEASES 519 (2002); *INS Role for Police Considered*, WASH. POST, Apr. 4, 2002, at A15; Susan Sachs, *A Nation Challenged: Illegal Immigrants: Long Resistant, Police Start Embracing Immigration Duties*, N.Y. TIMES, Mar. 15, 2002, at A11.

89. See Jonathan Peterson, *Noncitizens Must Report If They Move*, L.A. TIMES, July 23, 2003, at pt. 1, p. 1.

90. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power.") (citations omitted); see, e.g., *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) (holding that most of Proposition 187, a California law seeking to effectively regulate undocumented immigration, was preempted by federal law). But see Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignities*, 35 VA. J. INT'L L. 121 (1994) (contending that states should have an increased role in immigration regulation).

tion enforcement.⁹¹ When given the opportunity, local governments have fallen prey to the popular stereotype of Latina/os as foreigners.⁹² A videotape captured local police in Riverside County, California in 1996 brutally beating two undocumented Mexican immigrants who tried to evade the Border Patrol.⁹³ In an effort to rid the community of undocumented immigrants, police in a Phoenix, Arizona suburb violated the constitutional rights of U.S. citizens and lawful immigrants of Mexican ancestry by stopping persons because of their skin color or use of the Spanish language.⁹⁴ The Los Angeles Police Department's Ramparts Division reportedly engaged in a pattern and practice of violating the rights of immigrants over many years.⁹⁵ One can expect additional civil rights violations when local law enforcement authorities, who generally are not well versed in the immigration laws, seek to enforce those laws.⁹⁶

A shift in immigration enforcement from the federal to local level would have a dramatic impact on the immigrant community in the United States, perhaps the most significant of all the responses to September 11, 2001. It would open the door to further civil rights abuses of Latina/os. Moreover, it may also be bad for law enforcement, as immigrant communities would be afraid to cooperate with the police in reporting crime and participating in criminal investigations. That is precisely why so many police agencies prohibit their officers from inquiring about the immigration status of victims, suspects, and witnesses.⁹⁷

91. See Victor C. Romero, *Devolution and Discrimination*, 58 N.Y.U. ANN. SURV. AM. L. 377 (2002); see, e.g., MANUEL PASTOR, JR. ET AL., *LATINOS AND THE LOS ANGELES UPRISING: THE ECONOMIC CONTEXT* 11-13 (1993) (discussing Los Angeles Police Department sweeps of Latina/o immigrants in South Central Los Angeles in the wake of the May 1992 Rodney King violence); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523 (6th Cir. 2002) (reviewing evidence that Ohio law enforcement officers asked only Latina/o motorists for immigration documentation); H.G. Reza, *Minor Offenders in Orange County Taken to Border Patrol*, L.A. TIMES, Feb. 12, 2001, at B1 (reporting that local police agencies were arresting Latina/o immigrants on minor criminal matters and, rather than prosecuting them, transported them to nearest INS checkpoint to facilitate their deportation).

92. See Johnson, *supra* note 19, at 117-29.

93. See Kenneth B. Noble, *Videotape of Beating by Authorities Jolts Los Angeles*, N.Y. TIMES, Apr. 3, 1996, at A10.

94. See 1997 ARIZ. ATTORNEY GEN., RESULTS OF THE CHANDLER SURVEY, at 31.

95. See Theodore W. Maya, Comment, *To Serve and Protect or to Betray and Neglect?: The LAPD and Undocumented Immigrants*, 49 UCLA L. REV. 1611, 1622-23 (2002).

96. See Linda Reyna Yañez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Laws*, 1 HISP. L.J. 9 (1994) (describing civil rights issues posed when local law enforcement authorities attempt to enforce immigration laws).

97. See Maya, *supra* note 95, at 1612-13, 1614-24, 1627-30.

E. Conclusion

More immigration reform may be coming in the future, with likely negative impacts on immigrant communities having nothing to do with terrorism. In dealing with noncitizens, the political branches of government can act with relatively few constraints, at least in the short run.⁹⁸ Consequently, security measures in the immigration laws can be overbroad to the detriment of noncitizens.⁹⁹ In times of crisis, politicians and policymakers are reluctant to resist laws, such as the Antiterrorist Act and the USA PATRIOT Act, because of the possible claim that they are “soft” on the terrorist threat.¹⁰⁰ Despite the relative lack of legal constraints,¹⁰¹ several courts have intervened to halt the excesses of the federal government’s war on terrorism.¹⁰² Nonetheless, efforts at persuading the political branches of the federal government—Congress and the President—to soften the “war on terrorism” will no doubt also be necessary in attempts to fully protect the rights of noncitizens.

III. INDIRECT LEGAL IMPACTS OF SEPTEMBER 11 ON IMMIGRANT AND MINORITY COMMUNITIES

The events of September 11 likely will have more general legal consequences than simple reform of the immigration laws. Two major immigration reform measures in the works on that date—both which would have particularly benefited Mexican citizens—fell by the wayside. More ominously, after years of national consciousness-raising about its evils, racial profiling enjoyed a comeback in popularity as efforts to locate Arab and Muslim terrorists were the number one priority of the federal government. This development threatens not sim-

98. *See supra* note 7 and accompanying text.

99. *See supra* note 7 and accompanying text.

100. Indeed, Attorney General John Ashcroft accused those who questioned the Bush administration’s response to the events of September 11 of supporting the terrorist cause. *See* Neil A. Lewis, *Ashcroft Defends Antiterror Plan; Says Criticism May Aid U.S. Foes*, N.Y. TIMES, Dec. 7, 2001, at A1.

101. *See supra* note 7 and accompanying text.

102. *See* *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (affirming injunction barring blanket denial of access to press to immigration court hearings in “special interest” cases); *Center of Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 215 F. Supp. 2d 94 (2002) (ordering U.S. government to disclose names of persons detained as “material witnesses,” except in cases in which court ordered that records be sealed), *stay granted*, 217 F. Supp. 2d 58 (2002); *United States v. Awaldallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002) (holding that “material witness” was unlawfully detained and that grand jury testimony must be suppressed). *But see* *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (reversing finding that denial of public access to removal proceedings violated the Constitution); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (reversing order allowing access by attorney to U.S. citizen arrested as an “enemy combatant” in Afghanistan).

ply immigrants but minority communities generally in the United States.

A. *The End of Positive Immigration Reform*

Before the tragedy of September 11, immigrant rights advocates believed it possible that Congress would ameliorate the harshest edges of the 1996 immigration reform legislation.¹⁰³ Over several years, immigration rights activists had built broad support for a series of immigration reforms to "Fix 96."¹⁰⁴ All such legislative proposals appear to have died a quick death on September 11. Immigrant advocacy groups currently marshal scarce political resources to attempt to thwart aggressive pieces of restrictionist legislative and regulatory measures that would adversely impact the immigrant community.¹⁰⁵

The demise of immigration reform legislation will allow the harsh 1996 immigration laws to continue to injure immigrants. As discussed previously, immigrants from Mexico have been adversely affected by the 1996 immigration reforms, with record levels of deportations.¹⁰⁶ Consequently, Mexican immigrants who stood to gain the most from immigration reform are now the big losers with the failure to "Fix 96."

A more far-reaching immigration reform possibility also was moved to the back burner on September 11. A short-lived historical moment appeared in 2001 that promised to fundamentally transform migration to the United States from Mexico. Only days before September 11, the highest levels of the U.S. and Mexican governments discussed dramatically changing the migration relationship between the two nations; both U.S. President George W. Bush and Mexican President Vicente Fox expressed optimism about the possibility of a historic bilateral agreement addressing migration. The Mexican government supported a program that would allow for greater labor migration and the "regularization" of the status of many undocumented Mexican migrants in the United States,¹⁰⁷ while members of the Bush administra-

103. See *supra* notes 28-42 and accompanying text.

104. See Somini Sengupta, *The Immigration Debate: Full Employment Opens the Door*, N.Y. TIMES, June 18, 2000, § 4, at 4 (discussing "Fix 96" campaign and various immigration reform efforts); Eric Lipton, *As More Are Deported, a '96 Law Faces Scrutiny*, N.Y. TIMES, Dec. 21, 1999, at A1 (same).

105. See *supra* notes 43-102 and accompanying text.

106. See *supra* notes 38-42 and accompanying text.

107. See Ginger Thompson, *U.S. and Mexico to Open Talks on Freer Migration for Workers: Bush Signaling New Focus on Immigration Issues*, N.Y. TIMES, Feb. 16, 2001, at A1. For discussion of possible free labor movement between the United States and Mexico, see Kevin R. Johnson, *Regional Integration in North America and Europe: Lessons about Civil Rights and Equal Citizenship*, 9 U. MIAMI INT'L & COMP. L. REV. 33, 38-40 (2000-01).

tion hoped for a revamped guest-worker program.¹⁰⁸ Although difficult issues remained to be resolved, compromise appeared possible. After September 11, discussions virtually stopped in their tracks. A U.S./Mexico migration agreement restructuring migration between the United States and Mexico was apparently another casualty of the catastrophic events of that day.¹⁰⁹ The immigration talk of the day became about closing, not opening, the borders.

The end of serious discussions of a migration pact means that undocumented Mexican immigrants, the largest group of undocumented immigrants in the United States,¹¹⁰ will not have the opportunity to legalize and enjoy some modicum of security in their daily lives. Undocumented immigrants live on the periphery of U.S. social life, always subject to possible removal and often subject to economic exploitation in the workplace.¹¹¹ They also are more likely to experience the ripple effects of heightened border enforcement accompanying the overall enforcement crackdown after September 11.¹¹² Only time will tell whether the historic opportunity to fundamentally change the migration relations between the United States and Mexico was destroyed with the World Trade Center.

B. September 11 and the Comeback of Racial Profiling

Over the last few years, scholars and policymakers have been critically scrutinizing the use of racial profiling in criminal law enforcement, which in its most extreme form finds manifestation in police stops of African Americans, Latina/os, and other racial minorities on

108. See Eric Schmitt, *No Agreement Yet with Mexico on Immigration Plan, U.S. Says: Details Are Still Unsettled on Eve of Fox's Visit*, N.Y. TIMES, Sept. 1, 2001, at A1.

109. See Ronald Brownstein, *Green Light, Red Light: Is the Push to Liberalize Immigration Policy a Casualty of the Surprise Terrorist Attacks on September 11?*, AM. PROSPECT, Nov. 19, 2001, at 28; Julia Malone, *Immigration Takes Back Seat to Security*, ATLANTA J. & CONST., Mar. 20, 2002, at A3; Tim Weiner & Ginger Thompson, *Mexico Lower on Bush's List Since Sept. 11*, N.Y. TIMES, Dec. 29, 2001, at A4. Refusal of the U.S. government to seriously consider a migration pact led Mexican Foreign Minister Jorge Castaneda to resign in frustration. See Tim Weiner, *Foreign Minister in Mexico Will Quit, Frustrated by the U.S.*, N.Y. TIMES, Jan. 9, 2003, at A5.

110. See *supra* note 9 and accompanying text.

111. See Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001); Maria L. Ontiveros, *To Help Those Most in Need: Undocumented Workers' Rights and Remedies Under Title VII*, 20 N.Y.U. REV. L. & SOC. CHANGE 607 (1993-94).

112. See Fox Butterfield, *Drug Seizures Have Surged at the Border Officials Say*, N.Y. TIMES, Dec. 16, 2001, at A1 (noting impacts of increased border enforcement after September 11); Richard A. Serrano, *Arrests on Border Fall After 9/11*, L.A. TIMES, Feb. 2, 2002, at A1 (reporting fewer arrests on border after September 11 perhaps due to increased fears of arrest and detention).

account of their perceived group propensities for criminal conduct.¹¹³ Not long before September 11, the highest levels of the federal government publicly condemned racial profiling of African Americans by state and local government's law enforcement on the nation's highways.¹¹⁴ Public support appeared to coalesce around efforts to end racial profiling. Similarly, race-based enforcement of the immigration laws also was being re-examined.¹¹⁵ Although the Supreme Court condoned the practice in 1975,¹¹⁶ one court of appeals in 2000 held that the Border Patrol could not consider a person's "Hispanic appearance" in making an immigration stop.¹¹⁷

Similarly, sustained public criticism of racial profiling in national security matters came in the wake of the Wen Ho Lee case in which trumped-up espionage charges evaporated when exposed to the light of day.¹¹⁸ Presumptively disloyal because of long-held stereotypes about persons of Asian ancestry, Lee stood falsely accused of crimes against national security.¹¹⁹

The core argument against racial profiling is that law enforcement measures based on alleged group propensities for criminal conduct run afoul of the U.S. Constitution, which is generally premised on the view that individualized suspicion is necessary for police action.¹²⁰ Unfortunately, governmental reliance on statistical probabilities at the core of racial profiling has been resurrected by the September 11 terrorist attacks and has been met with broad public support.

After September 11, persons of apparent Arab ancestry and Muslims were questioned for possible links to terrorism, removed from

113. See, e.g., Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 442-43 (1997); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342-62 (1998).

114. See *Attorney General Seeks End to Racial Profiling*, N.Y. TIMES, Mar. 2, 2001, at A20.

115. See Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000); Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195 (2000).

116. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (holding that "Mexican appearance" was one relevant factor in, but alone not enough to justify, finding reasonable suspicion to conduct a stop to investigate whether occupants of a car were illegal immigrants).

117. See *United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (en banc), cert. denied sub nom. Sanchez-Guillen v. United States, 531 U.S. 889 (2000).

118. See Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689 (2000); FRANK WU, *YELLOW* 176-90 (2002).

119. See Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 79-82 (2001); Thomas W. Joo, *What, If Not Race, Tagged Lee?*, L.A. TIMES, Aug. 15, 2001, at B13.

120. See, e.g., *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

airplanes, and generally subject to scrutiny at every turn.¹²¹ Many commentators proclaimed that the reconsideration of the use of race in law enforcement made perfect sense. Public opinion moved to favor racial profiling, which will not affect the vast majority of U.S. citizens, in the "war on terrorism."¹²² The *Wall Street Journal* proclaimed that racial profiling in fighting terrorism "isn't discrimination; given the threat, it is common sense."¹²³ *A Case for Profiling*,¹²⁴ *The Case for Using Racial Profiling at the Airports*,¹²⁵ and *Americans Give in to Racial Profiling*¹²⁶ were titles of articles found in the popular press that offer a clear indication of the direction that the post-September 11 political winds are blowing on the issue.

The federal government's profiling of Arabs and Muslims in the terrorist dragnet promoted the legitimacy of racial profiling.¹²⁷ It also undermined federal efforts to pressure state and local law enforcement agencies to end the practice in criminal law enforcement. Ironically, a handful of local law enforcement agencies refused the Attorney General's request to interview Arabs and Muslims on the grounds that this constituted impermissible racial profiling.¹²⁸

Racial profiling in the "war on terrorism" poses serious risks to all minority communities in the United States, not just Arab- and Muslim-appearing people who may be subject to profiling given the current fears. Once the government embraces the use of race-based statistical probabilities as a law enforcement tool, the argument logically follows that probabilities may justify similar law enforcement techniques across the board, from terrorism to fighting crime on the streets to apprehending undocumented immigrants. As they were for

121. See Akram & Johnson, *supra* note 3; Volpp, *supra* note 5, at 1576-86; see, e.g., Thomas Ginsberg, *Profiling Charged on "Nightmare" Flight: A Doctor on Delta Flight 442 Was Detained by U.S. Marshals*, PHILA. INQUIRER, Sept. 19, 2002, at A1 (discussing case of Indian doctor pulled off plane and detained by U.S. Marshals after flight landed).

122. See Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413-14 (2002); Dave Boyer, *Ban on Profiling Draws Growing Concern*, WASH. TIMES, June 5, 2002, at A1; Charles Krauthammer, *The Case for Profiling*, TIME, Mar. 8, 2002, at 4; David E. Rovella, *Pro-Police Opinions on the Rise, Poll Says*, NAT'L L.J., Jan. 21, 2002, at A1; James Q. Wilson & Heather R. Higgins, *Profiles in Courage*, WALL ST. J., Jan. 10, 2002, at A12; Bruce Fein, *A Commensurate Response*, WASH. TIMES, Sept. 18, 2001, at A17.

123. *Profiles in Timidity*, WALL ST. J., Jan. 25, 2002, at A18.

124. Peter H. Schuck, *A Case for Profiling*, AM. LAW., Jan. 2002, at 59.

125. Stuart Taylor Jr., *The Case for Using Racial Profiling at Airports*, NAT'L J., Sept. 22, 2001, at 38.

126. Sam Howe Verhovek, *Americans Give in to Racial Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1.

127. See Akram & Johnson, *supra* note 3, at 331-41.

128. See Fox Butterfield, *Police Are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1; Jim Adams, *Twin Cities Police Undecided on Helping FBI*, STAR TRIB. (Minneapolis, Minn.), Nov. 22, 2001, at B7.

many years,¹²⁹ statistical probabilities can also be employed to justify focusing police action on African Americans, Asian Americans, and Latina/os in cities across the United States. Besides ordinary criminal law enforcement, the reliance on statistics, which justified internment of persons of Japanese ancestry during World War II,¹³⁰ could be used to justify racial profiling in immigration and national security matters.

IV. CONCLUSION

The federal government's multifaceted response to the horrible loss of life on September 11 has had, and will continue to have, a devastating impact on Arabs and Muslims in the United States. Although the harms to Mexican immigrants, as well as other immigrant communities, are less visible, these communities also will be adversely affected by the changes to the immigration laws and their enforcement. As the largest single group of lawful and undocumented immigrants in the United States, Mexican noncitizens are particularly sensitive to immigration regulation and stand to be the group most affected by immigration reform. Similarly, Mexican-American families who have immigrant members, or seek to bring family members to the United States from Mexico, will be affected as well. Unfortunately, however, little attention has been paid to the impacts of the "war on terrorism" on persons of Mexican ancestry. To avoid the negative impacts on Mexican immigrants that followed the 1996 immigration reforms designed to address concerns with terrorism, attention must be given to the post-September 11 immigration reforms allegedly directed toward terrorism.

The lessons of the immigration reforms triggered by the events of September 11, 2001 reinforce broader teachings about immigration law and policy. Immigration law can be reformed in overbroad ways to the detriment of immigrant communities, with much political support and little political resistance. Those adversely affected—immigrants of color in modern times—have limited political power, which is easily overcome in times of national crisis. This latest chapter simply reinforces what we have seen time and again in U.S. history.

129. See *supra* note 113 (citing authorities).

130. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the internment of persons of Japanese ancestry during World War II). See generally Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1 (1998); 19 B.C. THIRD WORLD L.J. 1 (1998) (analyzing the legacy of the *Korematsu* decision).